Eric Lau Man Hing v Eramara Jaya Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING PETITION NO D7(D1)–26–26 OF 1996
T SELVENTHIRANATHAN J
12 APRIL 2006

Civil Procedure — Contempt of court — Committal proceedings — Breach of court order that respondents within four days after service of order to purchase 30% shareholding of petitioner in company — Whether notice of motion for committal was undated and therefore bad — Whether procedure adopted under O 52 of the Rules of the High Court 1980 was irregular and/or invalid — Whether respondents had wilfully disobeyed order — Whether terms of order clear, unambiguous, absolute and unqualified — Rules of the High Court 1980 O 52

The petitioner filed the petition herein against all three respondents pursuant to s 181 of the Companies Act 1965 ('the Act'). He was a minority shareholder in the first respondent company ('the company') holding 30% of its shares as the nominee of one Madam Soh and her family ('the minority shareholders'). The second respondent held the balance 70% of the shares as the nominee of the third respondent. At the hearing of the petition, the court found as a fact that the affairs of the company were being conducted, and the powers of the respondents were being exercised, in a manner oppressive to and in disregard of the interests of the petitioner representing the minority shareholders which constituted sufficient grounds to grant the orders sought under s 181 of the Act. The reliefs granted included an order that the respondents purchase the petitioner's 30% shareholding in the company. However, the respondents failed to purchase the petitioner's shares in the company and, subsequently, the subject matter of the order, forming the basis of these committal proceedings. By an order of the court ('the order'), the respondents were ordered within four days after the service of the order to be made herein to purchase the 30% shareholding of the petitioner in the company. The petitioner initiated proceedings for an order of committal under O 52 of the Rules of the High Court 1980 ('RHC'). The respondents raised the following preliminary objections at the commencement of these committal proceedings: (a) that the notice of motion was undated and therefore bad; (b) that the procedure adopted under O 52 of the RHC was irregular and/or invalid.

Held:

(1) The fact that the notice of motion was not dated could not be attributed to any failure on the part of the petitioner as the senior assistant registrar of the High Court should have dated the same when signing and sealing notice. However, the franking on the notice showed that the filing fee was paid on 7 July 1999 and the senior assistant registrar must have signed the notice

around that date as the record showed that the sealed copy of the notice was placed in the respondents' solicitors' BC box on 21 July 1999. There was therefore no merit in this objection (see para 11).

(2) The procedure adopted as well as the documents filed were in order. The respondents were not able to pinpoint specifically that they were not. In any event, the respondents had waived their right to raise such preliminary objections by virtue of their having filed numerous affidavits and having failed to raise the objections on a number of previous occasions when the matter had been fixed for hearing and then adjourned on the application of one side or the other. There had been inordinate delay on the part of the respondents in raising the preliminary objections which operated to prevent the respondents from raising them at such a late stage of the proceedings (see para 12).

(3) The respondents claimed that they had no money or assets to purchase the petitioner's shares in the company to give effect to the order and swore various affidavits saying so. However, the petitioner was able to show in the affidavits filed that the respondents had bank accounts with monies in them, had monies placed on fixed deposits and were possessed of properties, thereby putting paid to the respondents' contentions claiming otherwise. The respondents claimed that they had no financial ability to pay for the shares, yet they were directors and shareholders in a number of companies (see para 16).

(4) During the hearing of the oppression petition that large amounts of monies were easily transferred by the respondents between themselves, their family members and other related companies. They could not therefore subsequently argue that the monies belonged to other companies. Even if the respondents were unable to or had no means to pay for the shares in the company, which they were ordered to purchase, the proper course for them to have adopted should have been to have instructed their solicitors or counsel to come back to the court to seek a variation of the order. That was never done (see para 17).

(5) As for the winding up petitions and bankruptcy proceedings behind which the respondents attempted to seek refuge, these in the main arose subsequent to the making of the order and, at any rate, they could not call into question any act carried out pursuant to a valid order of the court (see para 18). The respondents' reliance on the provisions of the Bankruptcy Act 1967 was also misconceived as there were no issues of false claims, fraud or voluntary settlement involved in this case for those provisions to apply. The respondents were directed to purchase the petitioner's shares in the company within a definite timeframe. The respondents failed or refused to do so. In return for the payment to be made by the respondents for the petitioner's shares, they would have received valuable consideration in the form of the additional 30% stake in the company (see para 24). The respondents had wilfully disobeyed the order. The terms of the order were clear, unambiguous, absolute and unqualified. Further, the solicitors who represented the respondents had also approved the terms of the draft order (see para 15).

(6) The second and third respondents were sentenced to two years and three years imprisonment respectively unless they sooner purged their contempt (see para 35).

[Bahasa Malaysia summary

Pempetisyen telah memfailkan petisyen ini terhadap ketiga-tiga responden menurut s 181 Akta Syarikat 1865 ('Akta tersebut'). Beliau merupakan pemegang saham minoriti dalam syarikat responden pertama ('syarikat tersebut') yang memegang 30% daripada sahamnya sebagai calon Puan Soh dan keluarganya ('pemegang saham minoriti'). Responden kedua memegang baki 70% saham tersebut sebagai calon responden ketiga. Semasa perbicaraan petisyen tersebut, mahkamah mendapati bahawa hakikatnya urusan syarikat tersebut telah dikendalikan, dan kuasa responden-responden dilaksanakan, dalam cara yang menindas dan tidak menghiraukan kepentingan pempetisyen yang mewakili pemegang saham minoriti yang mana membentuk alasan mencukupi untuk membenarkan perintah-perintah yang dipohon di bawah s 1818 Akta tersebut. Relief-relief yang dibenarkan termasuklah satu perintah agar responden-responden membeli 30% daripada pegangan saham pempetisyen dalam syarikat tersebut. Bagaimanapun, responden-responden telah gagal untuk membeli saham pempetisyen dalam syarikat tersebut dan berikut itu, perkara pokok perintah itu, yang membentuk asas prosiding komital tersebut. Melalui satu perintah mahkamah ('perintah tersebut'), responden-responden telah diperintahkan dalam tempoh empat hari selepas penyampaian perintah tersebut dibuat agar membeli 30% daripada pegangan saham pempetisyen dalam syarikat tersebut. Pempetisyen telah memulakan prosiding untuk satu perintah komital di bawah A 52 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Responden-responden telah menimbulkan bantahan awal berikut di permulaan prosiding komital tersebut: (a) bahawa notis usul tidak bertarikh dan oleh itu tidak sah; (b) bahawa prosedur yang digunakan di bawah A 52 KMT adalah di luar aturan dan/atau tidak sah.

Diputuskan:

(1) Fakta bahawa notis usul tersebut tidak bertarikh tidak boleh dianggap berpunca daripada apa-apa kegagalan di pihak pempetisyen kerana pemohon kanan pendaftar Mahkamah Tinggi sepatutnya telah memberi tarikh kepadanya apabila menandatangani dan memeterai notis. Namun, cap di atas notis itu menunjukkan bahawa pemfailan telah dibayar pada 7 Julai 1999 dan penolong kanan pendaftar itu mungkin telah menandatangani notis itu sekitar tarikh tersebut kerana rekod menunjukkan salinan yang dimeterai telah diletakkan dalam kotak BC peguam responden-responden pada 21 Julai 1999. Oleh demikian tiada merit dalam bantahan ini (lihat perenggan 11).

(2) Prosedur yang digunakan dan juga dokumen-dokumen yang difailkan adalah teratur. Responden-responden tidak dapat menunjukkan dengan khusus bahawa ianya adalah sebaliknya. Dalam apa keadaan, responden-responden telah mengetepikan hak mereka untuk menimbulkan bantahan awal apabila mereka telah memfailkan beberapa afidavit dan telah gagal untuk menimbulkan bantahan untuk beberapa kali sebelumnya apabila perkara tersebut ditetapkan untuk perbicaraan dan kemudiannya ditangguhkan atas permohonan satu pihak atau sebaliknya. Terdapat kelewatan yang melampau di pihak responden-responden dalam menimbulkan bantahan awal tersebut

yang berfungsi untuk menghalang responden-responden daripada menimbulkannya lewat di peringkat prosiding (lihat perenggan 12).

(3) Responden-responden mendakwa bahawa mereka tiada wang atau aset untuk membeli saham pempetisyen dalam syarikat tersebut untuk menguatkuasakan perintah itu dan mengangkat sumpah dalam beberapa afidavit menyatakan sedemikian. Bagaimanapun, pempetisyen berjaya membuktikan dalam afidavit-afidavit yang difailkan itu bahawa responden-responden mempunyai akaun-akaun bank dengan wang di dalamnya, mempunyai wang yang diletakkan dalam deposit tetap dan memiliki hartanah, oleh demikian ianya bercanggah dengan apa yang telah didakwa sebaliknya oleh responden-responden. Responden-responden mendakwa bahawa mereka tidak kemampuan kewangan untuk membayar saham tersebut, namun mereka adalah pengarah dan pemegang saham dalam beberapa syarikat (lihat perenggan 16).

(4) Semasa perbicaraan penindasan petisyen banyak wang dengan mudah berpindah tangan oleh responden-responden antara mereka, keluarga mereka dan syarikat lain yang berkaitan. Mereka tidak boleh menyatakan bahawa wang tersebut milik syarikat lain. Jikapun responden-responden tidak mampu atau tiada sumber untuk membayar saham dalam syarikat tersebut, yang mana mereka diperintahkan untuk membelinya, haluan yang betul untuk mereka gunakan adalah sepatutnya dengan mengarahkan peguam mereka untuk hadir semula ke mahkamah untuk memohon pengubahan perintah itu. Ini tidak berlaku (lihat perenggan 17).

(5) Berhubung petisyen penggulungan da prosiding kebankrapan yang responden-responden cuba memohon untuk mendapat perlindungan, ini hanya timbul berikutan perintah itu dibuat dan, apa sekalipun, mereka tidak dapat menyoal tentang pelaksanaan apa-apa tindakan yang dimulakan menurut perintah sah mahkamah (lihat perenggan 18). Kebergantungan responden-responden terhadap peruntukan Akta Kebankrapan 1967 juga disalah tanggap kerana tiada isu tentang tuntutan palsu, fraud atau penyelesaian sukarela yang terdapat dalam kes ini untuk peruntukan-peruntukan. Responden-responden diarahkan untuk membeli saham pempetisyen dalam syarikat tersebut tanpa tempoh masa yang ditetapkan. Responden-responden telah gagal atau enggan berbuat demikian. Sebagai balasan pembayaran yang akan dibuat oleh responden-responden untuk saham pempetisyen, mereka akan menerima balasan bernilai dalam bentuk tambahan 30% pegangan dalam syarikat tersebut (lihat perenggan 24). Responden-responden dengan sengaja tidak mematuhi perintah tersebut. Terma perintah itu adalah jelas, tidak taksa, mutlak dan tidak bersyarat.. Bahkan peguam yang mewakili responden-responden juga membenarkan terma-terma perintah draf tersebut (lihat perenggan 15).

(6) Responden-responden kedua dan ketiga telah dijatuhkan hukuman dua dan tiga tahun penjara masing-masingnya kecuali jika mereka membersihkan penghinaan mereka (lihat perenggan 35).]

Notes

For cases on committal proceedings, contempt of court, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 1576–1598.

Cases referred to

Allport Alfred James v Wong Soon Lan [1992] 2 SLR 385 (refd)
Arthur Lee Meng Kwang v Faber Merlin Malaysia Bhd & Ors [1986] 2 MLJ 193 (refd)
Bukit Melita Sdn Bhd v Lam Geok Hee & 7 Ors [1997] 4 AMR 3160 (refd)
Burkley v Crawford [1893] 1 QB 105 (refd)
Eric Lau Man King v Eramara Jaya Sdn Bhd & Ors [1998] 7 MLJ 528 (refd)
Deborah Building Equipment Ltd v Scaffco Ltd & Anor The Times Law, 5 November 1986 (refd)
Hisham Sobri & Kadir (suing as a firm) v Lim Chau Seng & Anor [1987] 2 MLJ 387 (refd)
Jasabena v Beh Heng Poo & Anor [1985] 1 MLJ 394 (refd)
Messrs Hisham, Sobri & Kadir v Kedah Utara Development Sdn Bhd & Anor [1988] 2 MLJ 239 (refd)
Steiner Products Ltd v Willy Steiner Ltd [1966] 2 All ER 387 (refd)

Legislation referred to

Bankruptcy Act 1967ss 52, 53
Companies Act 1965 ss 181, 218(1)(i), 223
Debtors Act 1869 [UK] s 4
Rules of the High Court 1980 O 45 r 7, O 52 r 2(2)

Wong Chong Wah (Lim Koon Huan with him) (Skrine) for the applicant/petitioner.
Tee Geok Hock (Shakir Hussain and Kurshed Ibrahim with him) (Mohamed Noor Don & Associates) for the respondents.

T Selventhiranathan J:

BACKGROUND

[1] Pursuant to leave granted by the judge then sitting in High Court D1 (Commercial Division) at Kuala Lumpur to initiate proceedings for an order of committal under O 52 of the Rules of the High Court 1980 ('the Rules'), the petitioner filed this notice of motion at encl (49) against the second and third respondents (hereinafter referred to collectively as 'the respondents' unless otherwise specified) for the following order in these committal proceedings:

(i) that Eu Foong Hin and Lim Beng, the second and third respondents abovenamed, be committed to prison for their contempt of this Honourable Court by wilfully disobeying the order of Court dated the 29th day of June 1998 whereby the abovenamed second and third respondents were ordered within four (4) days from the service of the said order to buy 30% of the petitioner's shares in Eramara Jaya Sdn Bhd at the price of RM3,514,527.15 pursuant to the order of this Honourable Court dated the 26th June 1997;

(ii) that Eu Foong Hin and Lim Beng, the second and third respondents abovenamed, do pay the petitioner the costs of and incidental to this application and also of the issuing and execution of any order to be made herein;

(iii) such further or other order as the Court deems fit.

[2] I had disposed of the petition herein on 26 June 1997 when I was the sitting judge in High Court D1 (Commercial Division) at Kuala Lumpur. The reported case of *Eric Lau Man King v Eramara Jaya Sdn Bhd & Ors* [1998] 7 MLJ 528 sets out in full the facts on which the petition was based and my decision in respect of the reliefs sought in the petition.

[3] While subsequently sitting as judge in High Court D7 (Commercial Division) at Kuala Lumpur, this case file was transferred to me on the direction of the then Chief Judge Malaya after the said sitting judge in High Court D1 had granted the petitioner leave on 2 July 1999 to commence these committal proceedings.

[4] The brief facts of the petition herein that resulted in these committal proceedings are as follows.

[5] The petitioner filed the petition herein against all three respondents pursuant to s 181 of the Companies Act 1965 ('the Act'). He was a minority shareholder in the first respondent company ('the company') holding 30% of its shares as the nominee of one Madam Soh and her family ('the minority shareholders'). The second respondent held the balance 70% of the shares as the nominee of the third respondent. The minority shareholders' grievances were, inter alia:

(a) the third respondent had taken full and effective control of the company although it had been agreed that the minority shareholders would be in charge of site and administrative matters in a development carried out by the company while the majority shareholders would be in charge of technical matters in the company and in the development itself;

(b) the majority shareholders had also come to control the company's funds totally with the appointment of the third respondent's brother, who was neither a director nor a shareholder of the company, as the third signatory of the company's cheques;

(c) there had been irregular financial transactions by the majority shareholders purportedly on behalf of the company, for instance, the granting of temporary loans to a company called Wijaya Kancing Sdn Bhd which was not entitled to loans from the company, and payments to third parties in excess of what was due to be paid by the company or where nothing was owed by the company;

(d) the third respondent and his brother had withdrawn substantial funds from the company and deposited the same in fixed deposit accounts in their individual or joint names;

(e) disposal of certain lands belonging to the company at an undervalue to a new company set up by the third respondent called Code Brilliant Sdn Bhd without the consent of the minority shareholders;

(f) there had not been any payment of dividends by the company despite the substantial profits made by the company from the sale of its properties and despite having a substantial amount of cash in hand.

[6] The petitioner submitted that there was an undeniable case of oppression and disregard by the majority shareholders of the minority shareholders' interests.

[7] At the hearing of the petition; I found as a fact that the affairs of the company were being conducted, and the powers of the respondents were being exercised, in a manner oppressive to and in disregard of the interests of the petitioner representing the minority shareholders which constituted sufficient grounds to grant the orders sought under s 181 of the Act: see *Eric Lau Man Hing v Eramara Jaya Sdn Bhd & Ors*. The reliefs granted included an order that the respondents purchase the petitioner's 30% shareholding in the company for RM3,514,527.15.

[8] However, the respondents failed to purchase the petitioner's shares in the company and, subsequently, on 29 June 1998, the subject matter of the order, forming the basis of these committal proceedings, was granted. By that order of court dated 29 June 1998 ('the order'), the respondents were 'ordered within four days after the service of the order to be made herein to purchase the 30% shareholding of the petitioner in Eramara Jaya Sdn Bhd at the price of RM3,514,527.15'.

[9] The grounds for these committal proceedings appear in the statement at encl (42) filed pursuant to O 52 r 2(2) of the Rules as well as in the petitioner's affidavit dated 28 December 1998 at pp 1–20 of bundle 'PB-1 '. The various affidavits filed in these proceedings were compiled into bundles 'PB-1' and 'PB-2' for ease of reference.

HEARING OF APPLICATION FOR ORDER OF COMMITTAL VIDE ENCL (49)

[10] The respondents raised the following preliminary objections at the commencement of these committal proceedings:

(a) that the notice of motion at encl (49) was undated and therefore bad;

(b) that the procedure adopted under O 52 of the Rules was irregular and/or invalid.

[11] I dismissed the preliminary objections as they were vague or lacked merit. The fact that encl (49) was not dated could not be attributed to any failure on the part of the petitioner as the senior assistant registrar of High Court D1 should have dated the same when signing and sealing encl (49). However, the franking on encl (49) shows that the filing fee was paid on the 7 July 1999 and the senior assistant registrar must have signed encl (49) around that date as the record shows that the sealed copy of encl (49) was placed in the respondents' solicitors' BC box (meant for the delivery of court documents) on the 21 July 1999. There was therefore no merit in this objection and it was accordingly rejected.

[12] As for the contention that the procedure adopted under O 52 of the Rules was irregular and/or invalid, I was of the view that the procedure adopted as well as the documents filed were in order. The respondents were not able to pinpoint specifically that they were not. In any event, the respondents had waived their right to raise such preliminary objections by virtue of their having filed numerous affidavits and having failed to raise the objections on a number of previous occasions when the matter had been fixed for hearing and then adjourned on the application of one side or the other. It was also my finding here that there had been inordinate delay on the part of the respondents in raising the preliminary objections which operated to prevent the respondents from raising them at such a late stage of the proceedings: see the cases of *Bukit Melita Sdn Bhd v Lam Geok Hee & 7 Ors* [1997] 4 AMR 3160; *Jasabena v Beh Heng Poo & Anor* [1985] 1 MLJ 394; *Arthur Lee Meng Kwang v Faber Merlin Malaysia Bhd & Ors* [1986] 2 MLJ 193; *Hisham Sobri & Kadir (suing as a firm) v Lim Chau Seng & Anor* [1987] 2 MLJ 387 and *Allport Alfred James v Wong Soon Lan* [1992] 2 SLR 385.

[13] While many affidavits were filed by the parties in these committal proceedings (see bundles 'PB-1' and 'PB-2'), it was noted that at no point did the respondents deny knowledge of, or service on themselves, of the order. Further, the respondents were also represented by counsel at the hearing on 29 June 1998 when the order was made. (In fact, they had had legal representation all through, ie from the beginning itself when the petition was filed.) The order was served on the respondents on 14 November 1998 but was never complied with. The respondents did not appeal against the making of the order and neither was the order varied nor set aside. The order contained a specific indorsement under O 45 r 7 of the Rules giving notice to the respondents of the consequences that could follow in the event of non-compliance with the order. The respondents admitted that they did not comply with the order. However, their ostensible reasons for not complying were as follows:

(a) the order was ambiguous and not clear;

(b) the respondents had no means to purchase the shares of the petitioner in the company and the petitioner was unable to prove that the respondents had the capacity to pay for the shares;

(c) as the first respondent was faced with winding-up petitions, any purported transfer of shares in the first respondent would be null and void pursuant to s 223 of the Act and, therefore, it was impossible to implement the order;

(d) the third respondent claimed that various bankruptcy proceedings had been commenced against him and, under such circumstances, any purchase of shares or payment made by him would contravene ss 52 or 53 of the Bankruptcy Act 1967.

[14] I found that there was absolutely no merit in the above contentions of the respondents for the reasons which now follow.

[15] The terms of the order were clear, unambiguous, absolute and unqualified, ie the second and third respondents were to purchase the petitioner's 30% shareholding in the company for the sum of RM13,515,527.15 within four days of

the service of the order on them. Further, the solicitors who represented the respondents had also approved the terms of the draft order. A

[16] The respondents claimed that they had no money or assets to purchase the petitioner's shares in the company to give effect to the order and swore various affidavits saying so. However, the petitioner was able to show in the affidavits filed that the respondents had bank accounts with monies in them, had monies placed on fixed deposits and were possessed of properties, thereby putting paid to the respondents' contentions claiming otherwise. The respondents claimed that they had no financial ability to pay for the shares, yet they were directors and shareholders in a number of companies. B C

[17] It was also the finding of this court during the hearing of the oppression petition (see *Eric Lau Man Hing v Eramara Jaya Sdn Bhd & Ors*) that large amounts of monies were easily transferred by the respondents between themselves, their family members and other related companies. They could not therefore subsequently argue that the monies belonged to other companies. Even if the respondents were unable to or had no means to pay for the shares in the company, which they were ordered to, the proper course for them to have adopted should have been to have instructed their solicitors or counsel to come back to this court to seek a variation of the order. That was never done. D E

[18] As for the winding up petitions and bankruptcy proceedings behind which the respondents attempted to seek refuge, these in the main arose subsequent to the making of the order and, at any rate, they could not call into question any act carried out pursuant to a valid order of the court. This aspect of the respondents' argument will be dealt with later in this judgment. The respondents relied on the cases of *Burkley v Crawford* [1893] 1 QB 105 and *Messrs Hisham, Sobri & Kadir v Kedah Utara Development Sdn Bhd & Anor* [1988] 2 MLJ 239 to support their contention that the petitioner should prove that the respondents had the capacity to pay for the shares of the petitioner in the company which they were ordered to purchase. However, in my view, both the cases cited are not authority for such a proposition and further there is no such proposition in law. F G

[19] The case of *Burkley v Crawford* involved an attempt to commit for contempt of court based on an order for the payment of a sum of money, ie for a monetary judgment sum. As the judgment there was considered a monetary judgment, the English Court concluded that there was no jurisdiction to make the order for committal as prayed for based on the express language of s 4 of the Debtors Act 1869. In fact, that case involved an appeal from the decision of Bruce J where the latter made an order for commitment upon the default of the plaintiff in complying with an order for the payment of a sum of money. Upon appeal, Wills J reviewed a number of cases in the context of the Debtors Act 1869 and held as follows at pp 108 to 109 of the report of that case: H I

> in the present case it is not shewn that the debtor is dishonest, and, therefore, the case falls within the words and the policy of the Act. The Act was passed for the express purpose of getting rid of the indefinite and often life-long imprisonment to which, under the old law, debtors were liable. I think I can see how this order came to be made. *A case seems to have*

been mentioned to Bruce J, in chambers, in which an order for attachment was made by Charles J, against a person named Harvey. 1 have heard what the circumstances of that case were from Charles J, himself. He was satisfied on the affidavits that the person against whom he made the order had the money, and he treated the case as one of wilful default and dishonesty. No doubt the counsel who mentioned the case to Bruce J, at chambers was not aware of this fact. (Emphasis added.)

[20] Similarly, in the case of the respondents before this court, I was satisfied on the affidavits that the respondents had the means to purchase the petitioner's shares in the company but avoided doing so or refused to do so, and I treated their case as one of wilful default and dishonesty. The case of *Burkley v Crawford*, therefore, instead of being of assistance to the respondents, in fact supported the petitioner's case.

[21] As for the case of *Messrs Hisham, Sobri & Kadir v Kedah Utara Development Sdn Bhd & Anor*, a reading of the judgment of Edgar Joseph Jr J at p 242 of the report will show that the 'capacity to do so' referred to in this case refers to the legal capacity to comply with the order of the court. In that case, the alleged contemnors did not have the legal capacity to comply with the undertaking given to the court in their capacity as directors and/or officers of the defendant company as they were undischarged bankrupts. That being so, they could not in law (under the Companies Act 1965) act as directors and/or officers of the defendant company and therefore they had no legal capacity to comply with the undertaking given on their behalf.

[22] The facts in the present case were different. As can be seen from the oppression petition hearing and the decision therein as reported in *Eric Lau Man Hing v Eramara Jaya Sdn Bhd & Ors*, such claims of incapacity to pay and financial impecuniousity were inherently incredible and unacceptable and could not be countenanced by this court in the light of the numerous irregular and oppressive financial transactions made by the respondents to the detriment of the minority shareholders.

[23] On the issue of the winding up petitions against the company, the only winding up petition pending at the material time was the winding up petition filed by the petitioner under s 218(1)(i) of the Act simultaneously with the oppression petition herein under s 181 of the Act. In these circumstances,, it was legally correct to file petitions under both ss 181 and 218 of the Act. Subsequent winding up and bankruptcy proceedings filed were not relevant to the issue at hand since one must look at the material or operative time of the breach of the order for the purpose of these committal proceedings. The order clearly stipulated that the purchase of the petitioner's shares in the company by the respondents must be made within four days of the service of the order on the respondents. In any event, s 223 of the Act relied on by the respondents clearly provides that any disposition of the assets of a company, including the transfer of its shares, can be proceeded with where the court so orders, as was done in this case.

[24] Similarly, the respondents' reliance on the provisions of the Bankruptcy Act 1967 was also misconceived as there were no issues of false claims, fraud or voluntary settlement involved in this case for those provisions to apply. The respondents were

directed to purchase the petitioner's shares in the company within a definite timeframe. The respondents failed or refused to do so. In return for the payment to be made by the respondents for the petitioner's shares, they would have received valuable consideration in the form of the additional 30% stake in the company. A

[25] Based on the facts adduced in this case, it was clear that the respondents had wilfully disobeyed the order of this court. In the case of *Deborah Building Equipment Ltd v Scaffco Ltd & Anor* (The Times Law, 5 November 1986), Potts J sitting in the Queen's Bench Division held as follows: B

> Furthermore, unless the terms of the order were absolute and unqualified, a breach would not be proved unless the plaintiff also established that the defendant's disobedience to the order was wilful or deliberate. C

[26] Potts J further held that it was no answer to a contempt charge to prove that the failure to comply with an order was casual, inadvertent or accidental, particularly where the relevant court order was unqualified in its terms. Similarly, the terms of the order of this court in the present case were clear, unambiguous, absolute and unqualified in that the respondents were to purchase the petitioner's 30% shareholding in the company for the sum of RM3,515,527.15 within four days of the service of the order on them. Having regard to the factual matrix of the present case as contained in the affidavits filed, I found that the respondents' disobedience of the order was blatant, wilful and deliberate. D E

[27] Potts J further stated in *Deborah Building Equipment Ltd v Scaffco Ltd & Anor* as follows:

> ... If the defendant, who was legally advised, had sought to question the terms or scope of the order he could have come to court to do so. He should not have simply disobeyed it. F

[28] I accept that as a correct statement of the law and state that, in the present case, the respondents had legal advice at all material times but chose instead to simply disobey the order as no attempt whatsoever was ever made to approach the court to vary the order. To my mind, this was proof beyond any reasonable doubt that the respondents' disobedience of the order was intended to be blatant, wilful and deliberate and, in fact, was so. G

[29] In the case of *Steiner Products Ltd v Willy Steiner Ltd* [1966] 2 All ER 387, Stamp J had this to say at p 390 of the report of that case: H

> This is not a case where the complaints are complaints of conduct which can properly or fairly be described as, casual or accidental, because those offending signs were on the doors of the defendants' premises for many weeks, for all to see and for all employees of the defendant company to see. It seems to me that the undertaking has, within the meaning of RSC O 42 r 31, been wilfully disobeyed. I
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> Counsel, on behalf of the defendants, apologised fully and freely for what the defendants have done or left undone, but he submitted that the conduct of the defendants had not been wilful or 'contumacious', which, as I understand it, he equated with the word 'wilful' or 'wilfully' in RSC O 42 r 31. As I have indicated I take another view.

Counsel for the defendants relied extensively on a recent judgment of Stirling J, in *Worthington v Ad-Lib Club, Ltd* [1964] 3 All ER 674; [1965] Ch 236. He asked me to say that the effect of that decision was that nothing short of stubborn opposition to the terms of an order or undertaking amounted to wilful disobedience so as to be punishable by proceedings for attachment. I do not think that Stirling, J, so held, but, if contrary to my view, he did so hold, then I prefer to follow the remarks of the Court of Appeal in *Fairclough & Sons v Manchester Ship Canal Co (No 2)* [1897] WN 7 where it was said:

> *The principles on which the court acts when it is asked to sequestrate the property of a company upon the ground of disobedience to one of its orders are the same as those applicable where it is sought to commit a private individual to prison for contempt. In these cases, casual, or accidental and unintentional disobedience to an order of the court is not enough to justify either sequestration or committal; the court must be satisfied that a contempt of court has been committed — in other words, that its order has been contumaciously disregarded.*

I do not think that the Court of Appeal intended to use the word 'contumaciously' as meaning something different from 'wilfully', for to C do so would be to put a gloss on the words of the order, which they will not, in my judgment, tolerate. Chitty J, took the view that disobedience which was worse than casual, accidental or unintentional must be regarded as wilful, in *AG v Walthamstow Urban District Council; Walthamstow Sewage Question* (1895) 11 TLR 533 and Warrington J in *Stancomb v Trowbridge Urban District Council* [1910] 2 Ch 190, took a similar view.

(Emphasis added.)

[30] However, in the above case, Stamp J imposed a fine instead of making an order for sequestration as the contempt had been remedied before the hearing and there was no further cause for complaint.

[31] The respondents in the present case did not in any way satisfactorily show that their failure to comply with the order was casual, accidental or unintentional. On the contrary, their conduct went so far as to constitute stubborn opposition to the terms of the order made by this court, even applying the test espoused on behalf of the defendants in *Steiner Products Ltd v Willy Steiner Ltd* in the respondents' favour here, which, of course, is not the law.

[32] In the circumstances, I found that the petitioner in these committal proceedings, which were quasi-criminal in nature, had proved beyond any reasonable doubt that the respondents had wilfully disobeyed the order of court and as such were guilty of contempt of court within the test laid down in cases such as *In Re Bramblevale Ltd* [1970] 1 Ch 128 (CA) and *Messrs Hisham, Sobri & Kadir v Kedah Utara Development Sdn Bhd & Anor*.

[33] In the latter, Edgar Joseph Jr J stated as follows at p 242 of the report of that case:

> Now, it is well-settled law that contempt of court is an offence of a criminal character since the liberty of the alleged contemnor is at stake. That being so, it is fundamental that a man ought not to be penalized unless he has both a fair opportunity to comply with the law and the capacity to do so. Any other approach would not only be morally objectionable but also should have no place in a legal system based on ideas of fair play and justice.

[34] In my view, the respondents here were given both a fair opportunity to comply with the law (ie with the order) and had the capacity to do so (ie to purchase the petitioner's shares in the company in that there was no legal impediment to their doing so), as stated by Edgar Joseph Jr J above, so as to render them subject to punishment in accordance with the law.

PUNISHMENT

[35] After hearing the pleas in mitigation (which included the issues raised above by the respondents in opposing the committal proceedings), I sentenced the second and third respondents to two years' and three years' imprisonment respectively unless they sooner purged their contempt.

[36] I was of the view that the respondents deserved the imposition of custodial sentences and that the same were justified because, looking at the facts and the course of the proceedings in this case, it was clear that the second and third respondents have been defiant and unrepentant throughout, from the time the oppression petition was filed and heard up to the conclusion of these committal proceedings. They have lied, concealed material facts, manoeuvred and schemed to bring about events and transactions to try and ensure that the petitioner would not be able to obtain due justice notwithstanding the clear findings of oppression and the consequential order made by this court. In fact, on finding both the second and third respondents guilty beyond any reasonable doubt of acting in contempt of court, I indicated to them and counseled them that they should mitigate their disobedience of the order by way of restitution to the petitioner through the purchase of his shares in the company. However, instead, they both persisted in lying to and deceiving this court as to their intention and true capacity to obey the order and continued to look for excuses and justifications for their refusal to obey the order of this court.

[37] Perhaps it would be most pertinent here to quote again from the decision of Potts J in *Deborah Building Equipment Ltd v Scaffco Ltd & Anor* where the following appears in the report of that case:

> Now I have listened to the evidence very carefully over the last few days. I have found that you were in breach of the orders of Mr Justice Gatehouse in a number of respects. I want to say this to you, that I have well in mind that last August and September you were under considerable pressure and I well understand the sort of pressure that you were being subjected to. But the fact is that had you, on receipt of the court's order, felt that your circumstances were such that the orders made were too onerous or placed impossible burdens upon you because of a shortage of staff, and so on, then the course that you could and should have taken was to instruct your legal advisers (and 1 am satisfied that you had legal advisers at all material times) to come back to this court and seek a variation. That was never done. It must be understood by you and anyone in your position, that when the court makes an order, until that order is discharged or varied, its terms must be adhered to and, if they are not adhered to, as I found that in a number of respects the terms of Mr Justice Gatehouse's order were not adhered to by you, then you and those In breach are in contempt of court and that is a very serious matter indeed, because what has hitherto been a commercial dispute between companies like yours, you acting as director, on the one hand, and companies like the plaintiffs, becomes a matter of public concern. I hope I have made it plain on a number of occasions during the course of this hearing that two matters trouble

me. One is a contempt of court, which is a serious public matter, and the other, the interests of the litigants - the interests in particular here of Deborah who have lost a substantial quantity of their equipment. Now, I have given careful thought to what I should do with you. I have come to the conclusion that the matter is far too serious to be dealt with by way of a fine and that in any event a fine would achieve nothing, bearing in mind your financial circumstances and the fact that it would simply divert any money that you might find away from your creditors. These are serious breaches. These are particularly serious aspects, in my view, concerning Beeston and concerning what was found in your yard. I am satisfied that the only appropriate way to deal with these breaches is to impose a sentence of imprisonment upon you. But, I take the view that your circumstances and the whole background of the case are such that I can direct that the execution of an order for committal to prison should be suspended, and I am prepared to do that. What I am concerned about is that from now on these proceedings — and I use that to cover everything that is going -on between you on the one side and Deborah on the other (between you, that is to say, Scaffco — and Deborah) — I am concerned that while these proceedings continue you should positively co-operate in every way that you can in order to ensure that not one scrap of Deborah's equipment that came through Scaffco's hands is kept from them. Do you understand?

MR PRICKETT: I do, my Lord.

POTTS J: Now, I cannot estimate the length of time that these proceedings may last but what I propose to do is to say that my order of committal should not be executed and indeed will be suspended, for a period of twelve months from today. The term that I have in mind is three months imprisonment and the condition is that during the ensuing twelve months you co-operate to the best of your ability to carry out the terms of the order of Mr Justice Gatehouse and assist in the recovery of equipment, the subject of the agreement made between you and Deborah. Do you understand?

MR PRICKETT: I do my Lord.

POTTS J: Now, if that condition is observed you will hear no more about this matter. You must understand, in your commercial dealings in future — and I say this to you because I appreciate that you are continuing in business — that if you come into conflict with the law again, then, it is in the respects that I have had to consider this week, it is extremely unlikely the court would-be prepared to take the course I am taking.

MR PRICKETT: Yes, my Lord.

POTTS J: Very well. Now you are willing to give me that undertaking?

MR PRICKETT: Yes, my Lord.

POTTS J: On the understanding that the order is of a suspended sentence of three months imprisonment for twelve months?

MR PRICKETT: Yes, my Lord.

POTTS J: Very well. You may go and sit down now.

MR PRICKETT: Thank you.

DISPOSITION:

Judgment accordingly.

(Emphasis added.)

However, in the present case, in the light of the obdurate as well as recalcitrant stand taken by the respondents to openly defy and continuing to defy the order made, I was not able to extend to the respondents the same opportunity to redeem themselves which Potts J extended to the contemnor Prickett in the above case.

[38] In *Danchevsky v Danchevsky* [1974] 3 All ER 934, Lord Denning MR had this to say at p 937 of the report of that case (in the Court of Appeal):

> it seems to me that when the object of the committal is punishment for a past offence, then, if he is to be imprisoned at all, the appropriate order is a fixed term. When it is a matter of getting a person to do something in the future — and there is a reasonable prospect of him doing it — then it may be quite appropriate to have an indefinite order against him and to commit him until he does do it. But if there is no such prospect — as here — there should not be an indefinite term. If he is to be imprisoned at all, it should be a fixed term for his past disobedience.

[39] In the present case, the disobedience was not only past but it was also continuing with no attempt made at complying with the order of the court: Hence, the custodial sentences imposed. I could find nothing in favour of the respondents so as not to impose custodial sentences upon them. They were neither so infirm, elderly (the second and third respondents being 39 and 52 years old respectively (or incapacitated that they should not be sent to prison for what they had done, ie acted in compete defiance of the order.

[40] I also took into consideration the mitigation of the second respondent that he was only a nominee of the third respondent. However, the fact remained that the second respondent consented to and agreed to act as a director of the company. It was also not disputed that at all material times the second respondent did abuse his position as a director of the company by agreeing and acceding to, and allowing, if not colluding and conspiring with, the third respondent to put into effect the machinations of the third respondent to carry out the numerous irregular payments, transfers and transactions which this court found were oppressive and prejudicial to the interests of the minority shareholders.

[41] The gravity of the offence of the respondents was in failing to see that the order of the court was obeyed. There are people who flout orders of the courts as if the orders are of no consequence. The respondents, to my mind, are within such category of people. It cannot be gainsaid that the orders of the courts should be obeyed or else there will be a breakdown in the due administration of justice and there will be no respect for the law.

[42] It was also clear that the third respondent was the brains behind the plotting and scheming to diddle the minority shareholders out of their legitimate rights in the company and that the second respondent lent himself to bring to fruition the third

respondent's machinations in this regard. Although he could be considered to be the puppet of the third respondent, nevertheless he also had to bear responsibility for the breach of the order, albeit to a lesser extent than the third respondent.

[43] I accordingly sentenced the second and third respondents to two years' imprisonment and three years' imprisonment respectively unless they sooner purged their contempt as I was of the view that such custodial sentences were certainly merited having regard to the history and circumstances of this case.

Order accordingly.

Reported by Peter Ling